UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re: BP p.l.c. SECURITIES LITIGATION	**Civil Action No. 4:10-md-2185**
In re: BP ERISA LITIGATION	**Civil Action No. 4:10-cv-4214**
	Honorable Keith P. Ellison

ERISA PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

Defendants' March 20, 2012 Notice of Supplemental Authority Supporting Their Motion to Dismiss (the "Notice"), and the decision referenced therein, *Fulmer v. Klein*, No. 3:09-CV-2354-N, slip op. (N.D. Tex. Mar. 15, 2012) ("*Fulmer II*"), fails to provide additional support for Defendants' Motion to Dismiss. Notably, Defendants previously submitted identical arguments regarding the earlier decision, *Fulmer v. Klein*, No. 3:09-CV-2354, 2011 U.S. Dist. LEXIS 36602 (N.D. Tex. Mar 16, 2011) ("*Fulmer I*"). *Fulmer II* simply reiterates the same reasoning from its predecessor. Moreover, *Fulmer II* supports several of Plaintiffs' arguments in opposition to the Motion to Dismiss:

- The Fifth Circuit has not opined on whether the presumption of prudence must be applied on a motion to dismiss;
- *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243 (5th Cir. 2008) ("*Kirschbaum*") does not require that Plaintiffs show dire circumstances to overcome the presumption in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995) ("*Moench*");
- A company's SEC filings that are incorporated by reference into fiduciary communications to participants are actionable under ERISA; and
- Under special circumstances, defendants have an affirmative duty to disclose company information to plan participants.

Fulmer II, like *Fulmer I*, rejected the plaintiffs' argument that the defendants breached their fiduciary duty to amend the plan because, according to the court, the plan language expressly required a plan amendment by the sponsor to remove company stock from the plan. *Fulmer II* at 10. In contrast, the BP Plans have no express requirement of an amendment for the Investment Committee to limit, freeze, or liquidate any of the investment options, including the BP Stock Fund. Rather, under Section 6.3 of the Plan, the Plan simply permits, rather than mandates, an investment in the BP Stock Fund. Under ERISA, once the stock became an imprudent investment, the Investment Committee not only had the ability, but it also had the duty to limit, freeze, or liquidate the BP stock

Fulmer II confirms Plaintiffs' position that in *Kirschbaum*, the Fifth Circuit did not address whether the *Moench* presumption should be applied on a motion to dismiss. *Fulmer II* at 15, n.13. This contradicts Defendants' earlier position that *Kirschbaum* requires the Court to apply the presumption at the pleading stage.

Although the *Fulmer* court (both I and II) chose to apply the *Moench* presumption on the motion to dismiss, its analysis of the *Moench* presumption does not compel dismissal in this case. Significantly, the *Fulmer II* court did not conclude that the only way to overcome the presumption is to allege that the employer-company was in a dire situation. Rather, the court simply acknowledged that under *Kirschbaum*, one way to overcome the presumption is to allege a dire situation, and it found that while the *Fulmer* plaintiffs' allegations attempted to plead a dire situation, they had not made sufficient allegations. *Fulmer II* at 13. In other words, showing dire circumstances is only one way to overcome the *Moench* presumption, and the court must review each matter on a case-by-case basis. Under the *Kirschbaum* framework, Plaintiffs sufficiently have alleged "persuasive and analytically rigorous facts demonstrating that

reasonable fiduciaries would have considered themselves bound to divest." *Kirschbaum*, 526 F.3d at 256. *See* Pl. Opp to MTD at 18-22.

Finally, *Fulmer II* does not support dismissal of Plaintiffs' disclosure claims. In *Fulmer II*, the court found that the plaintiffs did not sufficiently allege an omissions claim because the company's summary plan description ("SPD") did not incorporate public filings. *Fulmer II* at 8. In contrast, the BP's SPD and the Investment Options Guide for the BP Plans, both fiduciary communications, incorporated by reference BP's public filings, and encouraged and directed the Plans' participants to read BP's public filings to make informed investment decisions when investing in the BP Stock Fund. With respect to the affirmative misrepresentation claim, the *Fulmer II* court concluded that the allegations did not plead "special circumstances" that would give rise to an affirmative duty to disclose company information under ERISA. *Fulmer II* at 8-9. As previously briefed, Plaintiffs have pled the required special circumstances based on Defendants' failure to disclose important information about BP's systemic safety problems that had a significant impact on the Plans' investment in the BP Stock Fund, as well affirmative disclosure obligations set forth in ERISA's statutory and regulatory framework.

Dated: March 23, 2012

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that the foregoing Response to Notice of Supplemental Authority was served through the Court's CM/ECF system on March 23, 2012.

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